IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1977

No. 77-501

SHERWIN S. STERN,
Petitioner,

v.

UNITED STATES GYPSUM, INC., CHARLES E. DYKES, WILLIAM R. HOGAN, AND THOMAS HEFFERNAN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Petitioner Sherwin S. Stern respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on January 12, 1977, reversing a judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 547 F.2d 1329 and is reprinted as Appendix A. The court's preliminary opinion granting leave to appeal is

unreported and appears as Appendix B. The district court's opinion and supplementary opinion are also unreported and appear as Appendices C and D.

JURISDICTION

A timely petition for rehearing and suggestion for rehearing en banc was denied on June 2, 1977. (Appendix E). On August 23, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of centiorari to and including September 30, 1977. (Appendix F). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Did the court below err in holding that, because of "peripheral" considerations flowing from the First Amendment right to petition, 42 U.S.C. § 1985(1) does not provide relief to a federal officer for injury caused by a conspiracy *knowingly* to transmit false charges about him to his superiors for the purpose both of retaliating against him on account of the performance of his official duties and of interfering with the further performance of such duties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. 1985

> (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation,

> or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;
>
> * * * * *
>
> (3) . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

On November 14, 1974, petitioner Sherwin S. Stern commenced this action in the United States District Court for the Northern District of Illinois. Since the court of appeals, in the decision that petitioner asks this Court to review, directed the district court to grant respondents' motion to dismiss the complaint, the allegations contained in the complaint must be taken as true for purposes of this petition. *Estelle* v. *Gamble*, 429 U.S. 97,99 (1976).

According to the complaint, petitioner is and at all material times was employed in the Chicago District

Office of the Internal Revenue Service [IRS]. Beginning in approximately February of 1972, the Chicago Office began an audit of respondent United States Gypsum, Inc. [USG]. Petitioner, in his capacity as a large case manager for the IRS, was placed in charge of a team of revenue agents conducting the audit, and was named National Office Project Coordinator of the gypsum industry nationwide audit project.

Beginning sometime in 1972, respondents Dykes, Hogan, and Heffernan, the Executive Vice President, Treasurer, and Tax Manager of USG, and others unknown, entered into a conspiracy to retaliate against petitioner on account of his performance of his official duties and to "interrupt, hinder and impede" petitioner in the execution of those duties. In furtherance of the conspiracy respondents knowingly and maliciously manufactured false charges of serious professional misconduct by petitioner in the course of the USG audit. Over a period of sixteen months, respondents repeatedly communicated or caused other agents of USG to communicate these defamatory accusations to petitioner's superiors at the IRS. In addition, respondents contacted or caused other agents of USG to contact representatives of corporations that had been audited by the Chicago District of the IRS in an effort to gather and/or exchange derogatory information about petitioner. This information was to be conveyed to petitioner's superiors as well.

As a result of the activities of respondents, petitioner suffered multiple injuries to his person and property. Because of the accusations surrounding petitioner —accusations that respondents had maliciously fabricated and spread—in March, 1974 the IRS deemed it necessary to suspend petitioner from his duties as a large case manager, including his duties as manager of the USG audit and as national coordinator of the gyp-

sum industry audit, and to detail petitioner to the office of an assistant regional commissioner for the Midwest Region where he was denied any significant responsibilities. A notice of adverse employment action was issued to petitioner, proposing that his salary be reduced, his responsibilities decreased, and that he be transferred to the St. Louis Office of the IRS. And petitioner's professional reputation and ability to command the respect and confidence necessary to the practice of his profession were irreparably harmed.[1]

To redress these injuries, petitioner brought this action pursuant to 42 U.S.C. § 1985(1), which provides a civil remedy to a federal officer who is victimized by a conspiracy *inter alia* "to injure him in his person or property on account of his lawful discharge of the duties of his office . . . or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties." [2] Respondents moved to dismiss the complaint on the ground that the claim is not actionable under § 1985(1).[3] Chief Judge Parsons,

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[1] As the court of appeals noted, App. at 4a n. 6, petitioner, through his counsel, represented to the court that after the filing of the complaint in this case, the IRS investigation was terminated, the charges were dismissed, and petitioner was not demoted. Petitioner maintains, however, that he sufferred injury prior to being exonerated by the IRS, and that he continues to suffer from the accusations that were leveled against him.

[2] Petitioner's complaint also alleged two claims under Illinois law, and sought to invoke pendant jurisdiction over those claims.

[3] Respondents based their motion on an asserted lack of jurisdiction, contending that "it appears on the face of the complaint" that the cause of action does not arise under § 1985(1). Both the district court and the court of appeals appear to have *sub silentio* treated the motion as one contending that the complaint failed to state a claim upon which relief can be granted, see FRCP 12(b)(6), since both courts

in a lengthy opinion, denied the motion to dismiss, but authorized an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). A divided panel of the United States Court of Appeals for the Seventh Circuit granted leave to appeal (Appendix B).

On January 12, 1977, another panel of the Seventh Circuit, again divided, reversed the judgment of the district court in an extensive opinion described in detail below. In brief, a majority of the panel held that although § 1985(1) literally covers the conspiracy alleged in the complaint, and although respondents' alleged conduct jeopardizes the federal interest in the effective execution of federal law that underlies § 1985(1), nevertheless, on account of constitutional considerations, § 1985(1) is not applicable to conspiracies to interfere with the functioning of a federal officer by *knowingly* communicating false accusations about the officer to his superiors.

Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc. After requesting a response from respondents, the court of appeals, once again divided, denied rehearing en banc. (Appendix E).

REASONS FOR GRANTING THE WRIT

As we show herein, the majority below, on account of constitutional problems that this Court's decisions reveal to be non-existent, rendered an opinion that deprives both federal officers and the federal Government itself of the vital protections that § 1985(1) and its criminal counterpart (18 U.S.C. § 372) were designed

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addressed the merits of petitioner's claim rather than simply asking whether the claim "is wholly insubstantial and frivolous." *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946).

to afford. The profound consequences of the majority's decision, and the irreconcilable conflict between it and more than a decade of decisions by this Court, make this case worthy of plenary review.

In the first twenty-one pages of its twenty-nine page opinion, the majority rejected respondents' several efforts to read § 1985(1) in a way that would sharply limit its reach. The majority found that although the immediate impetus for § 1985(1) was violent attacks on federal officials including mail and revenue agents in the South, App. 7a-8a, 14a-15a, Congress used "the lesson of a particular historical period as the catalyst for a law of more general application," *id.* at 8a. The law Congress wrote, the majority explained, is designed to vindicate the general federal interest in the proper enforcement of federal laws:

> "Protection of federal officials from force, intimidation, threat, or injury at the hands of those who would disrupt, obstruct, or prevent the formulation and execution of federal functions is but a necessary incident o fsovereignty. It is akin to the inherent governmental 'power of self-protection' which has been consistently recognized in other contexts, *see, e.g.*, *United States* v. *Harriss*, 347 U.S. 612, 625-26 (1954); *Burroughs and Cannon* v. *United States*, 290 U.S. 534, 545 (1934), and it advances the important federal interest in the effective operation of government." *Id.* at 15a.

The majority stated that in the circumstances alleged here, this "important federal interest," as defined in the statute, is directly implicated:

> "A conspiracy to injure an official's person or property on account of the discharge of his duties or to prevent him from doing so . . . . interferes directly and substantially with the federal

> interest in the effective formulation and execution of federal policy and functions, regardless of whether force, intimidation, or threat are used." *Id.* at 12a.[4]

And the majority found that § 1985(1) "literally could be applied here," *Id.* 26a.

Having concluded that the federal interests underlying § 1985(1) are implicated by the conspiracy alleged by petitioner and that the statute is literally applicable, the majority nonetheless proceeded, in the last section of its opinion, to hold that conspiracies knowingly to communicate false charges about federal officers to the officers' superiors are outside the reach of the law. In creating this exemption, the majority relied entirely on its analysis of respondents' "constitutional argument" concerning the right to petition, and not on any analysis of the meaning or intent of § 1985(1). The majority was very careful to make this point clear:

> "We have reserved until now the constitutional objections urged by appellants to the application of a § 1985(1) remedy to these facts, in accordance with the well-established rule that the federal courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v.

[4] Accordingly, the court decided that § 1985(1) interdicts all conspiracies to injure a federal officer on account of his performance of his duties and not just those conspiracies that employ "force, intimidation, or threat," app. 10a-14a; and that a complaint under § 1985(1) need not allege either that the federal officer was attempting to enforce the Fourteenth Amendment or that the conspirators were motivated by an "invidiously discriminatory animus," app. 14a-21a.

The court declined to consider respondents' claim that a conspiracy cannot exist between a corporation and its agents because that claim had not been presented below. App. 7a-10a.

> *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concuring). Appellants' other grounds having proved nondispositive, we must consider their constitutional argument. It is based on the First Amendment to the Constitution, which provides, in pertinent part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." Appellants assert that the communication of complaints about Stern's official conduct was a classic exercise of this right. Accordingly, they insist, this court should either construe § 1985(1) to avoid the constitutional problems that would result if it were applied here, or hold that § 1985(1) is unconstitutional as applied to these facts." App. 22a.

Much, indeed most, of the court's discussion of the right to petition focused on a hypothetical attempt to apply § 1985(1) to a "straightforward petition lodged through . . . proper and established channels." App. 24a. But as the majority ultimately acknowledged, app. 27a, that is not what this case involves. Petitioner's complaint alleged that respondents had no bona fide grievance concerning petitioner for which they sought redress. Rather petitioner claimed that respondents had manufactured false charges, and, with knowledge of their falsity, had maliciously communicated the charges to petitioner's superiors in an effort to derail the audit petitioner was assigned to supervise. The real question, then, is whether the right to petition privileges the knowing communication of lies about a federal officer to his superiors.

The answer to this question is clear: there is no constitutional right to use the guise of a petition knowingly to spread false accusations about government officials. This Court's many decisions on the analogous

question whether the right to free speech privileges the knowing publication of lies about public officials admit of no other answer. Knowing falsehoods are *not* independently entitled to constitutional protection, as this Court explained in *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964):

> "* * * Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L.Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of an exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572. Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

Indeed even the majority below conceded that "falsehood 'has never been protected *for its own sake*.' [*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 771 (1976.)] (emphasis supplied)." App. 27a.

What troubled the majority was the possibility that legitimate exercises of the right to petition would be deterred if citizens could be required to stand trial whenever they are alleged knowingly to have presented a false and defamatory "grievance." As the majority explained:

> It is easy enough to allege knowing falsity in a complaint and thus to avoid, if [petitioner] is correct, a motion to dismiss. Summary judgment motions are particularly inappropriate vehicles by which to judge subjective considerations such as motive, intent, or knowledge. See *Staren* v. *American National Bank and Trust Company of Chicago*, 529 F.2d 1257, 1261-62 (7th Cir. 1976); *Conrad* v. *Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974). Defendants in suits such as this one, then, would in all likelihood be obliged to face full-blown litigation in which they must persuade a jury that their complaints, if not true, were at least based on enough facts as to avoid an inference of knowing or reckless falsity. This spectre alone could lead a citizen or taxpayer contemplating the lodging of a good faith complaint to reconsider. App. at 27a-28a.

The majority concluded that this "peripheral chill of the right to petition" is "significant enough" to render § 1985(1) inapplicable to conspiracies *knowingly* to transmit false charges about a federal official to the official's superiors. App. at 28a.

The majority's decision is palpably inconsistent with *New York Times* v. *Sullivan*, 376 U.S. 234 (1964), and its progeny. In those cases, this Court has recognized,

as did the court below, the importance of assuring First Amendment freedoms "that 'breathing space' essential to their fruitful exercise. *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). But the Court has also recognized that "avoid[ing] self-censorship . . . is . . . not the only societal value at issue" in cases of this type, *id.* at 341; important private and governmental interests are implicated as well. To reconcile these competing considerations, the Court has extended constitutional immunity to false charges made in good faith—that is, without knowledge of their falsity and without recklessness—but has refused to create an "unconditional and indefeasible immunity." *Id.* The Court has concluded that immunizing "good faith" misstatements provides "an extremely powerful antidote to the inducement of . . . self-censorship," *id.* at 342, and that providing any broader immunity would require "a total sacrifice of the competing value" of "redressing wrongful injuries," *id.* at 341.

What the court of appeals did here, at bottom, in order to avoid a "peripheral chill of the right to petition," was to sacrifice totally all competing considerations, despite the fact that those considerations are more weighty here than they were in the *New York Times* line of cases. In addition to the interest in "redressing wrongful injury" that was present in the *Times* cases, this case also implicates a strong federal concern with protecting federal officers and the operation of the federal government. The majority recognized the significance of these concerns early in its opinion (see pp. 7-8 *supra*), yet in defiance of the teachings of this Court, ignored the concerns completely in resolving the constitutional issues posed by this case. As as result, the majority succeeded in reading into § 1985(1) precisely that "unconditional and

indefeasible" immunity which this Court has consistently rejected.

Because the interests that § 1985(1) was designed to protect are of such overriding importance, the consequences of leaving undisturbed the majority's decision to sacrifice those interests would be profound. It is not necessary to discuss at length the grave dangers that the Big Lie and the reckless accusation pose to government officials and to the functioning of the Government itself; those dangers are too well illustrated by modern history to require recounting here. It is enough to recall the striking facts of this case as alleged in petitioner's complaint. Petitioner was assigned an important task by the IRS: supervision of the audit of gypsum companies. Respondents found this audit threatening to their self-interest, and entered into a conspiracy to derail it by discrediting petitioner. For a time the conspiracy succeded; suspicion enveloped petitioner and the IRS found it necessary to remove him from the audit until it could investigate the charges. And even though petitioner ultimately was exonerated by the IRS, his personal reputation and effectiveness as a federal officer remain adversely affected by the lies respondents spread. Yet the court of appeals' decision denies petitioner—and those in his situation—a federal remedy for the injury he suffered on account of his federal service.

It is of course true that state remedies still may be available to petitioner; even the majority acknowledged as much, App. at 28a. But all of the conspiracies covered by § 1985(1) are also actionable under state law. In enacting the statute, Congress decided that federal officers should not be required to rely exclusively on these state procedures. The reason for this congressional judgment is not difficult to understand; "[f]rom the days of prohibition to the days of the modern civil

rights movement, the statutes federal agents have sworn to uphold and enforce have not always been popular in every corner of the Nation," *United States* v. *Feola*, 420 U.S. 671, 683 (1975), and thus there has always been a danger that local hostility to federal law would operate to deprive federal officers of a state remedy to which they were legally entitled.[5] By holding § 1985(1) inapplicable to conspiracies knowingly to communicate charges against a federal official to his superiors, therefore, the majority has left federal officers without the full measure of protection that Congress sought to provide.

The majority's decision does more than deny federal officers protection against such conspiracies, however; the decision also denies protection to the Government itself, the ultimate victim of all conspiracies to prevent federal officers from performing their duties. To begin with, by precluding private suits, the majority has deprived the Government of the benefits it would have derived from such proceedings. Moreover, the necessary implication of the majority's decision barring civil actions is that criminal prosecutions are debarred as well. The criminal counterpart to § 1985(1)—18 U.S.C §372—was created by the same words of the same Act that created § 1985(1); in the Act of April 20, 1871, 17 Stat. 13, Congress first identified the types of conspiracies with which it was concerned, and then proceeded to provide civil and criminal sanctions against those who engage in such conspiracies. The

[5] It is for precisely this reason that Congress has enacted, and this Court has upheld, laws assuring a federal forum to federal officers accused of violating state criminal or civil laws in performing their federal functions, 28 U.S.C. § 1442; *Tennessee* v. *Davis*, 100 U.S. 257 (1880); *Williingham* v. *Morgan*, 395 U.S. 402 (1969); and laws providing a federal forum for trials of assaultive crimes against federal officers, 18 U.S.C. § 111; *United States* v. *Feola*, 420 U.S. 671 (1975).

language and legislative history of § 372 and § 1985 (1), therefore, are essentially identical.[6] If, in light of this language and history, § 1985(1) is properly read as not applying to conspiracies knowingly to transmit false charges about a federal officer to his superiors, § 372 must also be read.[7]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] In the process of recodification, the two sections have come to differ from each other in trivial respects; the operative language at issue here, however, is identical.

[7] Because the court of appeals' decision draws into question the constitutionality of 42 U.S.C. § 1985(1) directly, and 18 U.S.C. § 372 by necessary implication, this is a case in which 28 U.S.C. § 2403, which grants the United States a right of intervention, may be applicable. The lower courts did not cetrify this fact to the Attorney General as required by § 2403, but petitioner has served a copy of this petition on the Solicitor General in accordance with Rule 33(2)(b).

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1070

SHERWIN S. STERN,

Plaintiff-Appellee,

v.

UNITED STATES GYPSUM, INC., CHARLES E. DYKES, WILLIAM R. HOGAN, THOMAS HEFFERNAN,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois
No. 74 C 3300 — **James B. Parsons**, *Chief Judge.*

ARGUED SEPTEMBER 21, 1976—DECIDED JANUARY 12, 1977

Before HASTINGS, *Senior Circuit Judge*, PELL and WOOD, *Circuit Judges.*

PELL, *Circuit Judge.* This interlocutory appeal, taken, pursuant to 28 U.S.C. § 1292(b), from the district court's order denying defendants' motion to dismiss for lack of subject matter jurisdiction, presents questions of first impression[1] in the construction of 42 U.S.C. § 1985(1).[2]

[1] In *Kletschka v. Driver*, 411 F.2d 436, 446 (2d Cir. 1969), the court stated that § 1985(1) "apparently has never been construed by a court . . . ." The parties have cited no authorities construing the provision, and our research has disclosed none. *See also* C. ANTIEU, FEDERAL CIVIL RIGHTS ACTS § 94, at 124 (1971).

[2] Section 1985(1) defines conspiracies, for which Section 1985(3) establishes a private right of action, in these terms:

(Footnote continued on following page)

The first count of plaintiff Stern's complaint purports to state a claim arising under that section, and accordingly asserts jurisdiction under 28 U.S.C. §§ 1331(a) and 1343(1), (2), and (4). The second and third counts allege state law claims, sounding in defamation and malicious interference with Stern's contract rights, respectively. As to these counts, Stern invokes the jurisdiction of the federal courts under the doctrine of pendent jurisdiction. That doctrine, based on considerations of fairness and judicial economy, recognizes power in the federal courts to resolve a state law claim brought in conjunction with a federal claim where both "derive from a common nucleus of operative fact."[3] *United Mine Workers of*

[2] *continued*

> If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

The remedial provision of § 1985(3) is as follows:

> [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

[3] There are, in addition, certain discretionary considerations which might properly lead a district court to decline to exercise pendent jurisdiction, *United Mine Workers*, *supra*, at 726-27, but defendants-appellants did not argue any such grounds in the district court and they do not do so here. They seek to avoid all exercise of federal jurisdiction, not merely to limit its scope to federal issues.

America v. Gibbs, 383 U.S. 715, 725 (1966). Because it is the federal claim that provides the basis for the exercise of pendent jurisdiction, that claim "must have substance sufficient to confer subject matter jurisdiction on the court." *Id.*

Defendants-appellants do not argue that the district court would lack jurisdiction to resolve all the issues raised in Stern's complaint *if* the complaint sufficiently alleged a cause of action under Section 1985(1). Instead they insist that the complaint does not do so; and because it reveals on its face a lack of diversity of parties, there is no available basis for federal jurisdiction. Stern, in response, offers no alternate jurisdictional theories but rests on the claim that his complaint does state a cause of action under Section 1985(1). The sole and dispositive issue presented, then, while jurisdictional in its effect, is simply whether or not the complaint states a claim upon which relief under Section 1985(1) can be granted. In deciding that issue, we proceed under the accepted rule for determining the sufficiency of a complaint, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted).

The well-pleaded material allegations of the complaint, liberally read and accepted for the purposes of this appeal as true, *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965), present the following facts. Plaintiff-appellee Stern is, and was at all material times, an agent of the federal Internal Revenue Service (IRS). In February 1972 the Chicago District Office of the IRS began an audit of United States Gypsum, Inc. (USG), one of the defendants-appellants;[4] and Stern, in his capacity as a

[4] The alleged liability of USG is based on a theory of respondeat superior and derives solely from the activity of the individual defendants-appellants, Dykes, Hogan, and Heffernan, on behalf of and for the benefit of and within the scope of their responsibilities as officers and agents of USG.

large case manager for the IRS, was placed in charge of the team of revenue agents conducting the audit. Stern at that time enjoyed the highest professional reputation. Defendants-appellants Dykes, Hogan, and Heffernan, at all material times the Executive Vice President, Treasurer, and Tax Manager, respectively, of USG, conspired to injure Stern on account of the lawful performance of his official duties and to molest, interrupt, hinder, and impede him in the performance of those duties. To accomplish these ends, Dykes, Hogan, and Heffernan knowingly and maliciously fabricated false and defamatory charges of serious professional misconduct by Stern in the course of the USG audit,[5] and communicated or caused to be communicated these charges to Stern's IRS superiors. As a result, in March 1974 Stern was removed from his assignment on the USG audit. Thereafter, a notice of adverse employment action was issued to Stern, proposing a reduction in grade, salary, and responsibility and a geographic transfer.[6] His professional reputation, alleged to be peculiarly necessary for the practice of his profession, was seriously injured, his opportunities for advancement have been irreparably limited, and he has suffered humiliation, mental anguish, and physical and emotional distress.

The district court determined that these allegations stated a cause of action under 42 U.S.C. § 1985(1), and concluded therefore that it had jurisdiction of the case.

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[5] While the allegations of the charges of misconduct assume some variation of verbiage in the complaint, generally they take the form of accusations that Stern had prior to the completion of the audit put an improper offer of settlement before USG, had threatened USG in an effort to coerce a settlement, and had indicated that failure to settle would be followed by long and expensive investigations by the IRS and other governmental agencies.

[6] Stern represents to this court that, since the filing of the complaint, an IRS investigation of the charges was terminated, the charges were dismissed, and Stern was not demoted. Because actual injury prior to that time as well as continuing injury are alleged, of course, this fact has no relevance in assessing the sufficiency of the complaint.

In attempting to persuade us otherwise, defendants-appellants make a number of arguments: (1) there can be no conspiracy between the agents of a single corporate taxpayer; (2) the complaint does not allege violence, intimidation or threat of the direct and illegal nature contemplated by § 1985(1); (3) § 1985(1) provides a remedy only for federal officials injured in attempting to enforce the provisions of the Fourteenth Amendment to the Constitution; (4) the requirement of an invidiously discriminatory conspiratorial animus, which has been applied to § 1985(3), should be applied to § 1985(1) as well, and Stern has alleged no such animus; and (5) if § 1985(1) applies to the facts of this case, it unconstitutionally infringes on the right to petition the Government for a redress of grievances. We will consider each argument in turn.

I. The Intra-Corporate Conspiracy Question

A necessary element of a cause of action under § 1985(1) is that "two or more persons in any State or Territory conspire . . . ." Relying on this court's decision in *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (interpreting 42 U.S.C. § 1985(3)), appellants insist that Stern's complaint is fatally deficient in this regard, because the named conspirators were all officers or agents of USG and no conspiracy can be found in the business decisions of a single corporation, even if, as is often true, more than one corporate agent participated in making them. Stern disputes this argument on its merits.

We do not decide the question thus presented, for appellants did not present this theory to the district court, it was not part of the controlling question of law certified by that court, and appellants did not include it in the grounds supporting their petition for leave to appeal to this court. It is a well-settled general proposition that "a litigant cannot present to this court as a ground for reversal an issue which was not presented to the trial court and which it, therefore, had no opportunity to decide." *Desert Palace, Inc. v. Salisbury*, 401 F.2d 320, 324 (7th Cir. 1968); *Hamilton Die*

Cast, Inc. v. United States Fidelity and Guaranty Company, 508 F.2d 417, 420 (7th Cir. 1975).

To be sure, this rule has narrow exceptions, *e.g.*, where jurisdictional questions are presented or where, in exceptional cases, justice demands more flexibility. *Federal Savings and Loan Insurance Corporation v. Quinn*, 419 F.2d 1014, 1019 (7th Cir. 1969). Appellants argue that the lack of a federal claim which flows from an inadequate conspiracy allegation is, in this case, jurisdictional. Additionally, they point out that most of the cases establishing the general rule cited here arose on direct appeal of a final judgment, *but see Barrett v. Browning Arms Company*, 433 F.2d 141, 144 (5th Cir. 1970) (same rule applied to interlocutory appeal), and that different policy considerations apply to interlocutory appeals. In such cases, appellants suggest, the interests of justice and judicial economy are better served by considering all issues raised, whether presented to the court below or not.

At least in the circumstances of this case, we find appellants' arguments unpersuasive. If appellants had raised this conspiracy theory before the district court, and if that court had found *Dombrowski*, *supra*, to be controlling and had dismissed the complaint, Stern would have had the opportunity to seek leave to amend his complaint. Fed. R. Civ. P. 15(a). Rule 15(a) provides that "leave shall be freely given when justice so requires," and this circuit has adopted a liberal policy respecting amendments to pleadings so that cases may be decided on the merits and not on the basis of technicalities. *Fuhrer v. Fuhrer*, 292 F.2d 140, 143 (7th Cir. 1961); *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972). As was stated in *Fuhrer v. Fuhrer*, *supra* at 143, "[l]eave to amend should be freely given unless it appears to a certainty that plaintiff would not be entitled to any relief under any state of facts which could be proved in support of his claim." Stern has represented to this court that he would have sought leave to amend if it had become necessary, and, specifically, that at the time of the district court's order, he had acquired information justifying an allegation that persons neither employed by nor agents of USG

participated in the conspiracy. Because such an amended allegation would cure the asserted *Dombrowski* deficiency in the complaint, this would appear to be a classic case for application of the liberal leave-to-amend policy; in any event, we will not assume that the district court, to which the matter was never presented, would decide otherwise. This case in its present posture indicates to us both the soundness of the general rule limiting appellate review to issues presented below and the undesirability of departing from it here.

II. An Overview of the Legislative History of § 1985(1)

Each of the appellants' remaining three nonconstitutional arguments, in its own way, draws heavily on the historical conditions in which Congress passed the Act of April 20, 1871, ch. 22, 17 Stat. 13, of which 42 U.S.C. § 1985(1) was a part. Each invites this court to construe § 1985(1) narrowly in light of those conditions. We think it will be helpful, before considering these arguments individually, briefly to consider this general historical and legislative context.

Much of the tone of appellants' contentions is expressed in their assertion that "the circumstances alleged by Stern are simply of a whole different world from that addressed by the 42nd Congress." That much, we agree, is indisputable. The Act of April 20, 1871 (often referred to as the Ku Klux Klan Act) was enacted by a Congress acutely aware of the massive and frequently violent resistance in the southern states to federal Reconstruction after the Civil War. The Congressional debates on the Act are literally packed with tales of outrage: murders, whippings, banishments, rapes, house burnings, and other egregious acts were repeatedly and emotionally discussed. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 245-48, 320-21, 369, 374, 428, 436 (1871). The inability or unwillingness of state governments to deal effectively with these problems led many members of the Congress to characterize the times as presenting a condition of war, *id.* at 339, and *see id.* at 246-47, a state of anarchy, *id.* at 321, and a "grave and momentous crisis," *id.* at 248. In all of this, the

widespread, powerful, and secret Ku Klux Klan played a leading role, as an extensive report which was then before the Congress demonstrated, S. REP. NO. 1, 42d Cong., 1st Sess. (1871), and as was often recognized in the debates. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 247, 369, App. 166-67 (1871).

In the light of this context, we have no difficulty accepting the proposition that the immediate attention of the Forty-Second Congress was focused on circumstances which bear little resemblance to the facts alleged in Stern's complaint. It would, in fact, surprise us if any member of that Congress ever specifically contemplated the application of the provisions which became § 1985(1) to a conspiracy to defame and discredit a revenue officer to his superiors.

This conclusion is relevant to our determination, but it cannot alone be conclusive. We recognize that " 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' " *Great Northern Railway Co. v. United States*, 315 U.S. 262, 273 (1942), quoting *United States v. Union Pacific Railroad Company*, 91 U.S. 72, 79 (1876) But Congress surely may use the lesson of a particular historical period as the catalyst for a law of more general application. For this reason, among others, the rule is well established that construction of a statute begins with its language; indeed, where there is no ambiguity in statutory language, there may be no need to refer to legislative history at all. *Ex parte Collett*, 337 U.S. 55, 61 (1949); *American Community Builders, Inc. v. Commissioner of Internal Revenue*, 301 F.2d 7, 13 (7th Cir. 1962).[7]

[7] On the other hand, of course, there is no rule of law *precluding* legislative history analysis just because of language appears to be clear. *Cass v. United States*, 417 U.S. 72, 78-79 (1974). The opinion of this court in *United States v. United States Steel Corporation*, 482 F.2d 439, 444 (7th Cir. 1973), *cert. denied*, 414 U.S. 909, suggests a continuum analysis, which proceeds from the premise that "the plainer the language, the more convincing contrary legislative history must be."

Because two of appellants' arguments urge for § 1985(1) historical limitations not apparent in its terms,[8] we think it important to note here that Congress, in enacting what became § 1985(1), did not fashion a narrow and limited remedy applicable only to the southern states in 1871. The outrageous conditions there at that time were, no doubt, what induced Congress to act, but it chose to do so with a statute cast in general language of broad applicability, *see Monroe v. Pape*, 365 U.S. 167, 175-76, 183 (1961) (making the same point with reference to 42 U.S.C. § 1983, which was also part of the Act of April 20, 1871), and unlimited duration.[9] As a court, and not a legislature, we should honor that choice unless it produces results so unreasonable or so arguably unconstitutional that the Congress may not be presumed to have intended them. Other civil rights enactments from the same historical period are helpfully analogous. We think it fair to say that some of these, notably, *e.g.*, 42 U.S.C. § 1983 (providing a private remedy for deprivations of federal rights under color of state law), have been invoked by resourceful plaintiffs in factual settings utterly unlike those prevailing in 1871 and in all probability entirely unforeseen by the Forty-Second Congress. Yet where the statutory language has been satisfied, such lawsuits have generally been sustained. As the Supreme Court stated in *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971),

[8] These arguments are considered in parts IV and V of this opinion, *infra*.

[9] Appellants argued, with reference to the contextual gloss they would apply to § 1985(1), that it was originally conceived that the legislation would die a natural death in a few years' time. This contention is belied by the legislative history. President Grant's message to the Congress, which was the immediate stimulus for the legislation, did suggest that it might be advisable to impose a durational limit on the new law, CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871), and in fact such a limit was placed on one of the sections of the law, Act of April 20, 1871, ch. 22, § 4, 17 Stat. 14-15; this, of course, was not done with the provisions which became § 1985(1).

> [t]he approach of this Court to . . . Reconstruction civil rights statutes in the years since *Collins* [*v. Hardyman*, 341 U.S. 651 (1951)] has been to "accord [them] a sweep as broad as [their] language." *United States v. Price*, 383 U.S. 787, 801; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437.

III. Force, Intimidation, or Threat

Conceding that Stern's complaint in all other particulars makes allegations sufficient to satisfy the literal language of § 1985(1), appellants nonetheless insist that the use of conspiratorial means of "force, intimidation, or threat" is a necessary element of any action under that section and that Stern has not adequately alleged that element. Stern argues, and the district court determined, both that his complaint is drawn under portions of § 1985(1) which do not include such a requirement, and that even if the requirement were to be imposed, his complaint sufficiently satisfies it to withstand a motion to dismiss. His complaint alleges, *inter alia*, a conspiracy to injure him in his person, property, and professional reputation on account of the lawful discharge of his official duties "by intimidation, threat or otherwise."

We begin our analysis of this issue by considering the statutory language. As we read § 1985(1), it opens by stating the requirement that "two or more persons . . . conspire" and then proceeds, in four infinitive phrases, appropriately qualified and set off from each other with the disjunctive "or," to state the types of conspiracies covered. The section may thus be broken into component parts, as follows:[11]

> If two or more persons in any State or Territory conspire
>
> [1] *to prevent*, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof;

[11] Phrase numbers and emphasis are supplied for clarification.

> [2] *or to induce* by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed,
>
> [3] *or to injure* him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof,
>
> [4] *or to injure* his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties[.]

Reading § 1985(1) in this natural manner, the limitations of the "force, intimidation, or threat" requirement are apparent. While the requirement is express in the first substantive phrase, and incorporated by the words "by like means" in the second, it does not modify the last two substantive phrases, under which, of course, Stern's complaint is primarily drawn.[12]

We agree with the parties that § 1985(1) is not a model of clear and precise draftsmanship, but we think that the reading we give the section effectuates a relatively plain Congressional intention. It gives the normal grammatical significance to the use of the disjunctive "or" by allowing each of the phrases thus set off to have independent effect. *See Flora v. United States*, 362 U.S. 145, 149-50 (1960). Nor does this interpretation disrupt an apparently integrated whole.

[12] We note that the Fourth Circuit, applying the identical language of the criminal counterpart statute to § 1985(1) [18 U.S.C. § 372] in *United States v. Hall*, 342 F.2d 849 (4th Cir. 1965), *cert. denied*, 382 U.S. 812, read that statute just as we read § 1985(1). Setting out the statutory text pertinent to an indictment drawn under the last two phrases of 18 U.S.C. § 372, the court omitted the "force, intimidation, or threat" language. *Id.* at 850 n.1. Although the conduct at issue in *Hall* did in fact involve the use of force and the argument advanced by appellants here was not, apparently, made in *Hall*, the case nonetheless confirms our concept of the natural reading of the statutory language. In this regard, *see also* C. ANTIEU, FEDERAL CIVIL RIGHTS ACTS, *supra*, § 94, at 124.

The statute makes perfectly good sense without imposing a "force, intimidation, or threat" requirement on each of its parts. Congress could soundly have determined that the federal interest in the carrying out of federal functions would not be offended when, *e.g.*, two or more persons act together to prevent another from accepting or holding a federal position by offering that person a better job. When, on the other hand, force, intimidation, or threat are used to achieve that end, the federal interest would be offended even if no legally cognizable injury is done to the prospective or incumbent federal official.[13] A conspiracy to injure an official's person or property on account of the discharge of his duties or to prevent him from doing so, however, interferes directly and substantially with the federal interest in the effective formulation and execution of federal policy and functions, regardless of whether force, intimidation, or threat are used.[14]

Appellants' allegedly contrary citations to the legislative history provide no direct support for the proposition they would have us adopt. Their numerous citations to passages of the Congressional debates describing some of the outrages occurring at that time do not advance analysis of § 1985(1), for none of the passages relate specifically to that portion of the bill under consideration. The Act of April 20, 1871, contained many

[13] If only intimidation or threat were used, for example, it could well be that the official would not have suffered an assault, under the well-settled black letter rule that "mere words or threats . . . do not constitute an assault." 6A C.J.S. *Assault & Battery* § 6, at 323 (1975). Likewise, the elements of the comparatively recent tort of intentional infliction of emotional distress might or might not be present in such a case. Either way, the federal interest would seem to be offended.

[14] Our conclusion that the language "force, intimidation, or threat" does not modify all of § 1985(1) is buttressed by the fact that the language makes a poor fit with the last two infinitive phrases of the section. It is difficult to imagine, *e.g.*, how two or more persons might "conspire . . . by . . . intimidation, or threat . . . to injure [a federal official's] property," but the construction appellants urge for § 1985(1) would make that the scope of the last phrase, thus depriving it of any real meaning.

provisions to deal with the crisis of the times, and those which became § 1985(1) were only a small although important part thereof. We do not believe general debate passages describing the crisis provide a sufficient gloss to overcome the natural and logical meaning of the language of § 1985(1). Appellants' reliance on statements of Representative Cook, who introduced the amendment which became Section 2 of the Act (which section included the language of § 1985(1)), is similarly misplaced. Representative Cook did expressly disavow an intent to fashion a federal law to enforce state criminal laws "except . . . when the State may be unable to do so by reason of lawless combinations too strong for the State authorities to suppress." CONG. GLOBE, 42d Cong., 1st Sess. 485 (1871). But this reference is of no value in interpreting § 1985(1); it merely explains the purpose of the amendment offered, which substantially changed Section 2 by eliminating language that went a long way towards establishing such a general federal role in enforcing state criminal laws. It was this eliminated language that "raised the greatest storm" in the debates. *Monroe v. Pape, supra*, 365 U.S. at 181. We fail to see how an explanation of the reasons for eliminating those provisions sheds light on the meaning of the distinctly different and relatively noncontroversial provisions which remained in Section 2.

This court's decision in *Sarelas v. Anagnost*, 332 F.2d 111 (7th Cir. 1964), emphasized by appellants, does not in any way suggest a different conclusion. It is true that the plaintiff there alleged a conspiracy to "intimidate," "injure," and "harass" him, that this court characterized plaintiff's complaint as alleging, at most, "some kind of defamation," and that no cause of action under either 42 U.S.C. §§ 1985(2) or 1985(3) was found to exist. *Id.* at 112-13. But the facts of *Sarelas* were totally dissimilar to those presented here, and the opinion's two sentence rejection of the §§ 1985(2) and 1985(3) theories was manifestly based on the clear failure of those facts to fall within the ambit of those sections. Nothing in the opinion dealt with § 1985(1) or any arguable "force, intimidation, or threat" requirement, and the case surely

does not stand for any proposition pertinent thereto. Moreover, we agree with Stern that to the degree appellants are arguing here that "mere" defamation cannot amount to a violation of § 1985(1), they are wrong. The relevant question is whether or not the complaint alleges the elements required by the language of that section, not whether such elements might also constitute a state law cause of action. With respect to the relevant question, Stern is, so far, on solid ground.[15]

IV. The Relationship of Section 1985(1) to the Fourteenth Amendment

Although there is nothing in the express language of § 1985(1) to support such an interpretation, appellants insist that Stern's complaint is insufficient because the section creates a remedy only for federal officers injured in the course of or on account of attempting to enforce the provisions of the Fourteenth Amendment to the Constitution. They direct our attention to the fact that federal officers so attempting in 1871 were often threatened, intimidated, or injured by those resisting Reconstruction, and they argue that § 1985(1) was enacted as part of an integrated statutory scheme to deal with such resistance. We disagree.

In addition to the absolute lack of any textual indications in § 1985(1) that such a limitation on its scope was intended, there are numerous positive indications to the contrary. The title of the Act of April 20, 1871, for example, was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, *and for other Purposes.*" 17 Stat. 13 (emphasis supplied). President Grant's message to the Congress requesting the legislation gives an indication of what some of those "other Purposes" were. That message began with these words: "A condition of affairs now exists in some States of the Union rendering life and property insecure *and the carrying of the mails*

[15] Our resolution of the "force, intimidation, or threat" issue makes it unnecessary for us to consider Stern's contention that his complaint adequately alleges conspiratorial means of intimidation or threat.

and the collection of the revenue dangerous." CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871) (emphasis supplied). The Congressional debates also contain numerous references to injuries inflicted on federal mail and revenue agents. *See, e.g., id.* at 247, 248. Such agents, of course, in the normal course of their duties perform federal functions unrelated to the enforcement of the Fourteenth Amendment. The evil Congress sought to remedy was not limited to injury inflicted on those enforcing that Amendment, and we see no reason to conclude the remedy enacted was less broad than the evil to which it was directed.

We find untenable any suggestion that the constitutional authority of Congress to enact § 1985(1) depended on such a nexus to the Fourteenth Amendment as appellants suggest. Protection of federal officials from force, intimidation, threat, or injury at the hands of those who would disrupt, obstruct, or prevent the formulation and execution of federal functions is but a necessary incident of sovereignty. It is akin to the inherent governmental "power of self-protection" which has been consistently recognized in other contexts, *see, e.g., United States v. Harriss*, 347 U.S. 612, 625-26 (1954); *Burroughs and Cannon v. United States*, 290 U.S. 534, 545 (1934), and it advances the important federal interest in the effective operation of government. *See, e.g., United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 564 (1973); *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 99, 101 (1947). Such legislation is manifestly sustainable under Congress' constitutional power "[t]o make all Laws which shall be necessary and proper for carrying into Execution [its specified] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST., Art. I, § 8. No recourse to the Fourteenth Amendment would be necessary.

Nor is there any indication that Congress conceived the matter otherwise. What we have designated above as the first infinitive phrase of § 1985(1) was, in virtually identical language, incorporated in a criminal statute

enacted seven years before the adoption of the Fourteenth Amendment. Act of July 31, 1861, ch. 33, 12 Stat. 284. This fact was pointed out by Representative Shellabarger, the Chairman of the House Select Committee which authored the Act of April 20, 1871, when he presented to the Congress the amended language which became, *inter alia*, § 1985(1). CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871). Although the creation of a civil remedy and the specific provisions under which Stern's complaint is drawn were new with the 1871 Act, Representative Shellabarger stated his belief that these provisions were "clearly independent of the fourteenth amendment, referable to and sustainable by the old provisions of the Constitution . . . ." *Id.* We find no evidence that any member of Congress disagreed; none of the debates on the scope of power created by the Fourteenth Amendment make any reference to the provisions which became § 1985(1).

Our conclusion that § 1985(1) does not limit its protections to officers injured while attempting to enforce the Fourteenth Amendment is bolstered by the interpretation other courts have given the counterpart criminal statute, 18 U.S.C. § 372. Repeatedly, § 372 has been applied to conspiracies to injure, threaten, interfere with the work of, or intimidate federal officers who were performing duties unrelated to the enforcement of the Fourteenth Amendment. *See, e.g., Murphy v. United States*, 481 F.2d 57 (8th Cir. 1973) (occupation of a Bureau of Indian Affairs office prevented the performance of duties of those who worked there); *United States v. Barber*, 442 F.2d 517 (3d Cir. 1971), *cert. denied sub nom. Robinson v. United States*, 404 U.S. 846 (FBI agents in process of arresting a deserter were assaulted to facilitate the deserter's escape); *United States v. Hall*, *supra* (conspiracy to arrest or injure IRS agent investigating the sale of untaxed liquor).

V. Section 1985(1) and the "Invidiously Discriminatory Animus" Requirement of Section 1985(3)

Relying substantially on their view of the entire Act of April 20, 1871, as an integrated statutory scheme, appellants argue that § 1985(1) must be read to include

the requirement that an actionable conspiracy must be motivated by an "invidiously discriminatory animus." This requirement is borrowed from the Supreme Court's treatment of 42 U.S.C. § 1985(3) in *Griffin v. Breckenridge*, *supra*, 403 U.S. at 102. Section 1985(3) provides a remedy for injuries resulting from conspiracies

> for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . .[16]

Taking this language at face value, and pointing to the Congressional amendment which eliminated provisions authorizing general federal enforcement of common law crimes, *see* discussion in part III, *supra*, the *Griffin* Court held that "[t]he language [of § 1985(3)] requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102 (emphasis in original) (footnote omitted). Appellants ask us to impose this requirement on § 1985(1). If we do so, we must reverse the district court, for Stern's complaint makes no allegations of any class-based discriminatory motivation underlying the conspiracy which injured him, nor can we conceive any likelihood that if amendment were permitted, such could be alleged.

The serious initial difficulty with appellants' argument is that it is without support in the language of § 1985(1). Unlike § 1985(3), § 1985(1) does not limit its scope to conspiracies aimed at the deprivation of equal

[16] Section 1985(3) also defines as actionable conspiracies to injure on account of or to prevent the exercise of the right to support or advocate the election of candidates for federal office, and includes the civil remedy provision for all of § 1985; the latter is set out *supra* at note 2.

protection or equal privileges and immunities. Moreover, the existence of such a limit in § 1985(3) is persuasive evidence that Congress knew how to impose it when it was intended. We do not believe *Griffin* controls this case. Indeed, to the substantial degree that that decision is based on express language of § 1985(3) which is not present in § 1985(1), it undercuts appellants' argument.

We agree with appellants that it is proper to read the various provisions of a single Congressional enactment in conjunction with each other. But we reject the "corollary" appellants seem to be suggesting, that limitations expressed in one provision ought to control the rest. No doubt, the equal-protection—equal-privileges-and-immunities language of § 1985(3) was drafted with a view to the appropriate scope of Congressional power under the Thirteenth and Fourteenth Amendments. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess 478 (1871) (remarks of Representative Shellabarger). For the reasons we have previously stated, however, no such constraints were applicable to § 1985(1) and its protections of federal officers in the performance of their duties. and there is no indication Congress intended unnecessarily to limit the reach of these protections.

Two considerations reinforce our decision to apply § 1985(1) as its language seems plainly to suggest rather than "construing" it to include a requirement of "invidiously discriminatory animus." First, to read § 1985(1) as appellants suggest would deprive that section of much or all of its independent effect. The invidious animus requirement of *Griffin* is simply the test the Supreme Court established for determining whether a claim adequately involves a conspiratorial "purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws" as § 1985(3) requires. There can be no question that federal officials, no less than other persons, may in proper cases invoke the civil remedy for this § 1985(3) conspiracy. Because the only other element of a § 1985(3) cause of action is injury resulting from an overt act in furtherance of the conspiracy, an element common to a § 1985(1) cause, the

effect of imposing the invidious animus requirement on § 1985(1) would be to require a plaintiff to plead and prove a complete § 1985(3) cause of action in his § 1985(1) lawsuit. We cannot believe Congress intended § 1985(1) to have such merely duplicative effect. *See Griffin, supra*, 403 U.S. at 99.

The second reinforcing consideration to which we have adverted is that the counterpart criminal statute of § 1985(1) [18 U.S.C. § 372] has repeatedly been applied to circumstances in which no invidiously discriminatory animus was alleged or proved or even remotely inferable. *See, e.g., Murphy v. United States, supra; United States v. Barber, supra; United States v. Hall, supra.* We can see no reason for applying to the civil remedy a more restrictive rule of law than is applied in determining whether people may be criminally punished for offenses against the United States.

Perhaps because of the paucity of authority squarely on point, appellants and Stern suggest an analogy to 42 U.S.C. § 1985(2).[17] That section defines two broad classes of actionable conspiracies; the second of these includes language, similar to that of § 1985(3), requiring an intent to deprive a citizen of equal protection, or to injure

[17] Section 1985(2) provides:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; of if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws[.]

The remedial provision of § 1985(3) applies to the conspiracies thus defined.

a citizen for attempting to enforce equal protection, while the first contains no such language. Stern and the appellants seem to agree that the *Griffin* invidiously discriminatory animus requirement would apply to conspiracies defined in the second part of § 1985(2), and we may assume *arguendo* that this is so.[18] Judicial treatment of the first part, which lacks equal protection language, is, of course, more relevant here. Unfortunately, the sharpness of any such analogy is blunted by the fact that the parties each have one case to support their reference to this part of § 1985(2). *Kelly v. Foreman*, 384 F. Supp. 1352 (S.D. Tex. 1974), cited by Stern, rejects application of the *Griffin* requirement to the first portion of § 1985(2), on plain language grounds essentially similar to those we have expressed here. *Jones v. United States*, 401 F. Supp. 168 (E.D.Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. filed*, 45 U.S.L.W. 3178 (Sept. 7, 1976) (No. 343), reaches the opposite result.

The proper result in a § 1985(2) case, of course, is not before us, but the analogy having been urged, we find it necessary to indicate that we find the logic of *Jones* unpersuasive in the case at hand. First, the district court's opinion in *Jones* places substantial emphasis on the Congressional debate and amendment pertinent to Section 2 of the Act of April 20, 1871, with respect to the power of Congress to authorize federal prosecution of common law crimes. We have considered this question above. Whatever may be said about § 1985(2),[19] we have concluded that no nexus to the Thirteenth or Fourteenth Amendments was needed or perceived to be needed to

[18] A number of courts have so held. *See, e.g., Hahn v. Sargent*, 388 F. Supp. 445 (D.Mass. 1975), *aff'd*, 523 F.2d 461 (1st Cir.), *cert. denied*, 425 U.S. 904 (1976); *Kerckhoff v. Kerckhoff*, 369 F. Supp. 1165 (E.D.Mo. 1974); *McIntosh v. Garofalo*, 367 F. Supp. 501 (W.D.Pa. 1973); *Johnston v. National Broadcasting Company, Inc.*, 356 F. Supp. 904 (E.D.N.Y. 1973); *Phillips v. Singletary*, 350 F. Supp. 297 (D.S.C. 1972); *Boulware v. Battaglia*, 327 F. Supp. 368 (D.Del. 1971); *Kitchen v. Crawford*, 326 F. Supp. 1255 (N.D.Ga. 1970), *aff'd*, 442 F.2d 1345 (5th Cir. 1971), *cert. denied*, 404 U.S. 956.

[19] Arguably, at least, the first portion of § 1985(2) aims at protecting the sanctity of federal court proceedings and could be sustained without any reference to the Reconstruction Amendments.

sustain § 1985(1). Second, the *Jones* district court cited a number of cases for the proposition that the *Griffin* requirement applied to all of § 1985(2).[20] Recognizing that such cases would not be directly controlling here in any event, we note only that we do not read the cited cases that way. Notwithstanding occasional dicta therein, none of the cases so *held*, as each presented claims cognizable only under the second portion of § 1985(2). We realize that in the two sentences of its opinion addressed to the question, the Eighth Circuit in *Jones* affirmed the "holding" of the district court that "the racial or class-based discrimination rationale expressed . . . in *Griffin* . . . applies equally to all clauses of that statute." 536 F.2d at 271. Because the suit there presented was based, as pertinent here, only on § 1985(2), we believe this language may be read to refer only to the clauses of that provision,[21] even though the immediate context seems to suggest that reference was had to *all* of § 1985. If the broader result was intended, however, we must respectfully decline to agree with the obiter dictum.

VI. Section 1985(1) and the Right to Petition

Any injuries to Stern from appellants' alleged conspiracy resulted from the overt acts of communicating

[20] The cases cited by the district court are all set out in note 18 *supra*.

[21] As Chief Justice Marshall stated in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821), "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." Thus, *e.g.*, single sentences taken from the context of the opinions of this court in *Colaizzi v. Walker*, 542 F.2d 969, 972 (7th Cir. 1976), *cert. filed*, 45 U.S.L.W. 34-37 (Dec. 9, 1976) (No. 785); and *Elmwood Properties, Inc. v. Conzelman*, 418 F.2d 1025, 1028 (7th Cir. 1969), *cert. denied*, 397 U.S. 1063 (1970), might be read to suggest a necessary equal protection nexus or an invidiously discriminatory animus requirement for *all* of § 1985, even though both cases involved claims not even arguably actionable other than under § 1985(3). The mere failure in a single sentence to specify a statutory subsection under consideration surely creates no precedents, at least where the context supplies the specification.

or causing to be communicated complaints about Stern's performance of his official duties to his IRS superiors. We have previously expressed our agreement with appellants that the evils addressed by the Forty-Second Congress in enacting the Act of April 20, 1871, were of a meaningfully different nature, and that there is no indication any member of that Congress ever contemplated the application of what is now § 1985(1) to such facts as Stern's complaint alleges. We have rejected each of appellants' constructional arguments which were properly before us, however, because they would have distorted the meaning of § 1985(1) in all its applications in order to adhere more closely to that which the Forty-Second Congress was specifically addressing.

We have reserved until now the constitutional objections urged by appellants to the application of a § 1985(1) remedy to these facts, in accordance with the well-established rule that the federal courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Appellants' other grounds having proved nondispositive, we must consider their constitutional argument. It is based on the First Amendment to the Constitution, which provides, in pertinent part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." Appellants assert that the communication of complaints about Stern's official conduct was a classic exercise of this right. Accordingly, they insist, this court should either construe § 1985(1) to avoid the constitutional problems that would result if it were applied here, or hold that § 1985(1) is unconstitutional as applied to these facts.

Appellants' argument raises serious and important questions. For the right to petition for redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). It shares the "preferred place" accorded in our system of government

to the First Amendment freedoms, and has "a sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Indeed, as the Supreme Court recognized in *United States v. Cruikshank*, 92 U.S. 542, 552 (1875), the right to petition is logically implicit in and fundamental to the very idea of a republican form of governance.

The public criticism of governmental policy and those responsible for government operations is at the very core of the constitutionally protected free speech area, *see, e.g., Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). We think it plain that presenting complaints to responsible government officials about the conduct of their subordinates with whom the complainer has had official dealings is analogously central to the protections of the right to petition. It matters not that the subject of the grievance may not be political, in the sense of raising public policy issues, although we do not say that allegedly unprofessional conduct of IRS officials is not a matter of public interest. But even if it were not, First Amendment protections apply. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, ... U.S. ....., 44 U.S.L.W. 4686 (May 24, 1976); *United Mine Workers, supra* at 223; *Thomas v. Collins, supra* at 531. Indeed, the fact that a grievance may not arouse sufficient public concern to generate political support makes the individualized exercise of the right to petition all the more important. Unless the grievance embodies a violation of established and judicially enforceable state or federal right, individual petitioning may be the only available means of seeking redress.

Nor can it make a difference that the grievance is motivated by financial self-interest. So to hold would at once both deprive government of much of the public input upon which its representative nature vitally depends and "deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). Likewise, we consider it irrelevant to the applicability of the right to petition that its

exercise might have the effect of causing professional injury to the official about whom complaints are made, or even that the complainer may be aware of or pleased by the prospect of such injury. Whenever substantial charges of any credibility are made, a shadow of doubt, at least, may fall upon their object. This effect follows too naturally from its cause for its presence to vitiate the propriety of the use of First Amendment rights, if those rights are to retain meaning. The possibility that a citizen who feels himself to have been abused by a particular federal official may take satisfaction when the official gets his perceived due is too human for First Amendment protection to depend on its absence. *See id.* at 143-44.

Accordingly, we agree with appellants that the presentation of complaints about an auditing IRS agent's professional conduct to his superiors is a classic example of the right to petition.[22] A scurrilous anonymous letter or an attempt to marshal political clout to ruin an offending agent would certainly present different cases than does this open straightforward petition lodged through what the parties agree to be the proper and established channels. *See* 8 CCH 1977 STAND. FED. TAX REP. ¶ ¶ 5983 at 67, 112, 67, 114-15, 5985 at 67, 146. Construction of § 1985(1) to apply a federal damage remedy to such facts would raise grave constitutional questions, because "laws which actually affect the exercise of these vital [First Amendment] rights" need not do so directly and overtly to be adjudged constitutionally

[22] While the case before us is concerned with an IRS agent, we cannot be unmindful that some members of the public entertain the idea, irrespective of how poorly founded the idea might be, that complete cooperation with any governmental agent conducting an investigation is the best procedure for avoiding needlessly extended and searching probing. In *United States v. Lehman*, 468 F.2d 93, 97 (7th Cir. 1972), *cert. denied*, 409 U.S. 967, *e.g.*, the defendant dentist, although not successful in avoiding a prosecution, followed the advice of a professional journal that recommended the self-handling of interviews with IRS agents without the participation of auditors or attorneys. The attitude of complete cooperation would rather obviously preclude the making of an official complaint of misconduct except in the most egregious of circumstances.

offensive. *United Mine Workers, supra* at 222; *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). And we have no doubt that the prospect of a federal lawsuit resulting from any citizen complaint about the conduct of federal officials could chill the exercise of the right to petition.

We are not unmindful that a counter-argument could be advanced to the effect that the possibility of no federal statutory protection of a government agent in the circumstances alleged in Stern's complaint might very well chill entry into government service. Aside from the fact that we are unaware of any lack of applicants for non-policy governmental positions despite the lack of any such federal statutory protection heretofore, we note that when charges of misconduct are made through official channels, as was the case here, the protective machinery of due process hearings is available, with full opportunity to refute that which is unfounded.

If it were clear that Congress contemplated and chose an application of § 1985(1) that would create the consequences Stern seeks, we would be obliged to balance these considerations against the indisputable governmental power to protect federal officers against harassment and injury on account of the performance of their duties, *see* part IV *supra*, in order to determine whether the § 1985(1) remedy advanced compelling governmental interests in an appropriately narrow way. But we are not free lightly to impute to Congress an intention to invade the right to petition, *Noerr, supra* at 138; and as we have said, the legislative history lacks any specific indications of such an intention. It is basic to federal jurisprudence that courts must seek any reasonable construction of a statute that is consistent with its legislative purpose so as to avoid serious constitutional doubt. *Schneider v. Smith*, 390 U.S. 17, 26 (1968); *United States v. Rumely*, 345 U.S. 41, 45-46 (1953); *Ashwander v. Tennessee Valley Authority, supra*, 297 U.S. at 348 (Brandeis, J., concurring), quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932). We honor that rule here by holding that a § 1985(1) complaint is insufficient to state an actionable federal claim insofar as it only alleges injury resulting from complaints about

the plaintiff officer's official performance lodged by the defendants with the officer's superiors. Because Stern's complaint alleges no more, the district court should have granted appellants' motion to dismiss it.

We realize of course, that § 1985(1), as we have construed it, literally could be applied here. To do so, however, would produce such problematic results that we decline to assume Congress, on a silent record and in response to very different circumstances, intended them. *Cf. Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941); *United States v. Katz*, 271 U.S. 354, 357, 362 (1926). The Supreme Court's decision in *Noerr*, *supra*, while not on all fours with this case, provides a useful analogy. There the issue was whether the Sherman Act, 15 U.S.C. § 1 *et seq.*, could be applied in a private damage suit authorized by 15 U.S.C. § 15 to a concerted effort by numerous eastern railroads to obtain legislation and law enforcement harmful to truckers, who competed with the railroads. Conceding that the language of the Sherman Act could literally be applied to such conduct, 365 U.S. at 136, the Court nonetheless reasoned that such conduct was substantially dissimilar to the types of activities normally condemned by the Act. Finding that Sherman Act liability in such circumstances would raise important constitutional problems involving the right to petition, and seeing "no basis whatever" in the legislative history for concluding Congress intended to raise such questions, *id.* at 137, the Court held that the Act could not be applied. This mode of analysis seems to us appropriate here, and it leads, once followed, straight to the conclusion we have reached.

Although Stern does not argue the point, we are aware of the caveat in *Noerr*, 365 U.S. at 144, that the Sherman Act could be applied to "situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." The Court rejected such a conclusion there because the railroads were patently making a "genuine effort" to influence government. *Id.* Likewise, no inference of a "mere sham" would be possible here,

even if Stern were to amend his complaint to allege a "sham," for Stern's complaint makes it clear that the defendants genuinely sought governmental response to their charges, either by generating internal IRS pressure on Stern to act more professionally, or by having Stern removed from the USG audit. Just as in *Noerr*, the fact of defendants' success in obtaining what they sought further attests to the genuineness of the endeavor. Moreover, the possibility of inferring a "mere sham" here is even less than it was in *Noerr;* there, at least, direct if incidental injury to the plaintiffs' business relationships could well have resulted even if the defendants' publicity campaign had had absolutely no governmental impact. Here, in contrast, Stern's injuries resulted solely and directly from the defendants' charges' impact within the IRS. In this regard, we think it is significant that the defendants made their complaint to the very body concerned with whether a governmental employee was misusing the considerable power available to him. Compare this statement in *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, ... U.S. ....., 45 U.S.L.W. 4043, 4045 n.10 (December 8, 1976): "It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate those views directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands." We simply are not persuaded that Congress intended the language of § 1985(1) to curtail this type of redress-seeking under any circumstances.

Stern points out that his complaint alleges that appellants communicated or caused to be communicated their complaints with knowledge of their falsity. Relying on *Garrison v. Louisiana*, 379 U.S. 64 (1964), Stern insists that knowing falsehoods do not enjoy constitutional protection. *See also Virginia State Board of Pharmacy, supra*, ... U.S. at ....., 44 U.S.L.W. at 4693. We accept the formulation of this principle in the *Virginia State Board* case, that falsehood "has never been protected *for its own sake.*" *Id.* (emphasis supplied). But there is more involved here. It is easy enough to

allege knowing falsity in a complaint and thus to avoid, if Stern is correct, a motion to dismiss. Summary judgment motions are particularly inappropriate vehicles by which to judge subjective considerations such as motive, intent, or knowledge. *See Staren v. American National Bank and Trust Company of Chicago*, 529 F.2d 1257, 1261-62 (7th Cir. 1976); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974). Defendants in suits such as this one, then, would in all likelihood be obliged to face full-blown litigation in which they must persuade a jury that their complaints, if not true, were at least based on enough facts as to avoid an inference of knowing or reckless falsity. This spectre alone could lead a citizen or taxpayer contemplating the lodging of a good faith complaint to reconsider.

We are sympathetic to the argument that Stern makes on this point, and we consider this to be a relatively close case for precisely that reason. We have no quarrel with the proposition that a state's interest in protecting its citizens from common law torts justifies overriding these First Amendment considerations when knowing falsity is alleged, and although expressing no opinion one way or the other we are not to be understood as implying that Stern's common law theories are unmeritorious. A similar overriding of the right to petition might likewise be sustainable in federal legislation which clearly and narrowly intended that effect. All that we decide today is that the real if peripheral chill of the right to petition which Stern's knowing falsity rule could engender is significant enough for the First Amendment values to play a part in construing federal legislation which is asserted to provide a separate remedy. And we think that the sounder path here, on this silent legislative record, is to conclude that Congress did not intend in any way to infringe a taxpayer's right to lodge through the proper channels a complaint about the IRS agent in charge of auditing his tax account.

No citation of authorities is needed for the proposition that the rights our founding fathers set down in the First Amendment are the subject of special protection by the courts. Those rights despite their theoretical strength as a constituent of democratic government have

demonstrated remarkable fragility when exposed to the air of autocracy. While their protection should be the concern of all every year, it is particularly appropriate at the termination of the Bicentennial year of our nation to recall that the document which occasioned that celebration concluded its recital of grievances against a despotic ruler in these words:

> In every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.

Because the count of Stern's complaint drawn under § 1985(1) states no actionable federal claim and no other basis for federal jurisdiction exists, the order of the district court is reversed and this case is remanded to the district court with direction to dismiss the complaint.

REVERSED AND REMANDED.

HASTINGS, *Senior Circuit Judge.* I respectfully dissent from the majority opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

December 10, 1975

SHERWIN S. STERN
v.
UNITED STATES GYPSUM COMPANY, *et. al.*
Misc. No. 75-8086

Before FAIRFIELD, *Chief Judge,* and SWYGERT and BAUER, *Circuit Judges:*

The order appealed from denied a motion to dismiss. The gist of the complaint is that plaintiff is an Internal Revenue Agent who was assigned to audit defendant. Several employees of defendant conspired to injure him in his person, property, and professional reputation on account of the lawful discharge of his duties as an officer of the United States and to injure him "in his property" so as to impede him in the discharge of his duties. They carried out the conspiracy by making false and malicious reports to plaintiff's supervisiors charging plaintiff with improper conduct as an Agent. By reason of these reports, plaintiff has been given less significant assignments, and it has been proposed by IRS that plaintiff be decreased in grade and salary, and transferred.

The alleged federal cause of action is predicated upon 42 U.S.C. § 1985(1). That subsection provides a cause of action "If two or more persons . . . conspire . . . to injure (any officer of the United States) in his person or property on account of his lawful discharge of the duties of his office . . . or to injure his property so as to molest . . . or impede him in the discharge of his official duties."

Judge Parsons thought that an appeal at this stage might materially advance the termination of the litigation. Prob-

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* Judge Swygert voted to deny leave to appeal.

ably the only way an appeal would do so would be if it resulted in a holding that the complaint did not fulfill § 1985(1). The arguments to that end are that, like § 1985 (3), this subsection requires some class-based, invidious animus; and that it requires a more direct, physical injury to person or property than a maliciously false report to a government agency, which then injured plaintiff by acting upon the report.

There has been little, if any, judicial construction of this section. Although the probability of judicial economy in an early appeal is a close question, leave is granted to appeal.

Appendix C

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

SHERWIN S. STERN v. U.S. GYPSUM CO., INC.	No. 74 C 3300

MEMORANDUM OPINION AND ORDER

This cause arises out of an audit of the defendant company which was begun in approximately February, 1972 by the Chicago District Office of the Internal Revenue Service (IRS). Plaintiff, in his capacity as a large case manager for the IRS, was placed in charge of the team of revenue agents conducting the audit. Plaintiff alleges that the individual defendants together with persons unknown, while acting on behalf of and for the benefit of the defendant company and within the scope of their responsibilities as company agents, entered into a conspiracy to injure him and his property. Plaintiff further alleges that the purpose of this conspiracy was to frustrate his efforts in connection with the audit, and that the conspiracy was carried out, in part, by the conveyance and publication to his superiors at the IRS of certain false, malicious, and defamatory statements concerning his actions during the audit. Defendants deny these allegations; and the defendant company has filed a counterclaim charging that the plaintiff conspired with other IRS agents to coerce it into accepting an injust, undefined and unfounded multimillion dollar tax claim.

Plaintiff asserts that his claim arises under the Civil Rights Act of 1871, as amended. 42 U.S.C. § 1985(1). Defendants have moved for dismissal of this claim due to a lack of subject matter jurisdiction. The gravamen of defendants' motion is that plaintiff's allegations, if true, do

not constitute a violation of § 1985(1), and thus that there is no federal claim before this Court. More specifically defendants contend that a proper claim under § 1985(1) must contain allegations of some "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action," citing *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971). Defendants argue that § 1985(1) was only meant to "protect those particular federal representatives whose task it is to aid and protect those people susceptible to racial and other class-based discrimination" and "to protect those susceptible to racial and other class-based discrimination who are themselves engaged in duties on behalf of the United States." In view of the clear language, the historical development, and the legislative purpose of § 1985(1), together with the relevant prior case law on the Civil Rights Act, the defendants' motion cannot be allowed.

I.

Section 1985 states, in part, as follows:

> "If two or more persons in any State or Territory conspire to prevent by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officers of the United States to leave any State, . . . or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the subject of such conspiracy, whereby another is injured in his person or property . . . the party so injured . . . may have an action for recovery of damages, occasioned by such injury . . . against any one or more of the conspirators." 42 U.S.C. § 1985(1) and (3).

I find that the plaintiff has stated a sufficient claim under

the literal terms of § 1985 since he alleges, among other things, that: (1) he was a federal officer; (2) defendants conspired to injure him because he sought to lawfully discharge his duties as a federal officer; (3) defendants conspired to injure his property because he carried out certain of his duties as a federal officer; and (4) he has been injured as a result of defendants' conspiracy. Defendants' legal memoranda appear to concede that plaintiff has stated a sufficient claim under the actual language of § 1985(1).

II.

The history of § 1985(1) reveals that its provisions can be traced back to a Congressional Act of April 20, 1871, c. 22 § 2, 17 Stat. 13. This earlier enactment was entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, *and for Other Purposes* (emphasis added)." The Fourteenth Amendment had been proclaimed part of the Constitution about three years earlier, on July 21, 1868. The 1871 Act also contained the precursors to several other present provisions, including 42 U.S.C. § 1985(2) and (3); 42 U.S.C. § 1983; and 18 U.S.C. §372. And although civil liability for the conspiracies now part of § 1985(1) apparently originated in the 1871 Act, criminal liability for at least some of these very same conspiracies had existed at least ten years earlier. See the Act of July 31, 1861, c. 33, 12 Stat. 284. It would thus be in accord with the historical development of § 1985(1) to say that certain language in that section first arose prior to the adoption of the Fourteenth Amendment and that its remaining language arose for purposes other than to enforce the provisions of the Fourteenth Amendment.

III.

In light of the foregoing history, one could hypothesize that the original Congressional purpose behind the present § 1985(1) was to further the federal policy—established as early as 1861—which sought to eliminate private conspiracies aimed at interference with federal officers. Said policy

can be said to have been furthered in 1871 with the creation of a civil remedy against any such conspirators, as well as with the expansion in the types of conspiracies which were prescribed both civilly and criminally. Compare 12 Stat. 284 with 17 Stat. 13-14. This hypothesis, I believe, is—if not proven accurate—at least not disproved by the Congressional record relevant to the Act of 1871.

In presenting the 1871 Act to Congress, Congressman Shellabarger stated the following with respect to its second section [which contains the precursors to 42 U.S.C. § 1985 (1) (2) and (3)]:

> "I will state that the first part of the section down to the end of line fourteen, is now the law of the United States, having been enacted in 1861. Therefore the provisions of this section that are new are included in the portion following the fourteenth line." Cong. Globe, 42d Cong., 1st Sess., p. 478.

The first fourteen lines, together with the final provisions of the second section, did, in fact, constitute the aforementioned Act of July 31, 1961 dealing with criminal conspiracies; but these lines went beyond the earlier act by adding civil liability for such conspiracies. Congressman Shellabarger further stated immediately thereafter regarding the second section that:

> "The change which the amendment proposes to make in section two of the original bill as reported by the committee, so far as it relates to disputed grounds, so far as it is not confined to infractions of right which are clearly independent of the fourteenth amendment, referable to and sustainable by the old provisions of the Constitution, is to be found in those portions of the section which are contained in the part beginning at line twenty-five, I think . . ."

It can be surmised from this statement that certain changes in the law brought on by the second section of the 1871 Act were undisputed and were independent of the Fourteenth Amendment. In fact, besides adding civil liability for the conspiracies set out in the Act of 1861, the second section of the 1871 Act—in lines fourteen through twenty-five and

in its final provisions—added new types of private criminal conspiracies to those prescribed in the 1861 Act as well as civil liability as to them and added criminal and civil liability for private conspiracies to interfere with federal court witnesses, jurors and/or jurors' verdicts. And, the first twenty-five lines of the second section, 17 Stat. 13, may be said to have been adopted pursuant to the Congressional power vested in the Constitution, Act 1, § 8. See also President Grant's message of March 23, 1871, Cong. Globe, 42d Cong., 1st Sess. p. 244.

IV.

Neither the Court nor the parties are aware of any case law directly relevant to the question of whether or not plaintiff's allegations sufficiently state a cause under 42 U.S.C. § 1985(1). In fact, the Second Circuit Court of Appeals has recently stated that § 1985(1) "apparently has never been construed by a court." *Kletschka* v. *Driver,* 411 F.2d 436, 446 (2nd Cir. 1969). Yet case law on certain other provisions in the second section of the 1871 Act appears to support a denial of defendants' pending motion.

Contrary to the defendants' contention, the case of *Griffin* v. *Breckenridge, supra,* does not compel dismissal. The *Griffin* case dealt with § 1985(3), whose crucial distinctions from § 1985(1) include Congressional reliance on § 2 of the Thirteenth Amendment (and possibly on § 5 of the Fourteenth Amendment) rather than on Article I, 403 U.S. at 105, and its "language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities," 403 U.S. at 102. Defendants cite *Phillips* v. *Singletary,* 350 F. Supp. 297 (D. S.C. 1972) and *McIntosh* v. *Carofalo,* 367 F. Supp. 501 (W.D. Pa. 1973) for the proposition that the requirements of a § 1985(3) suit, under *Griffin,* have been applied to § 1985(2) suits, and thus argue the *Griffin* requirements are also binding in a § 1985(1) suit. While the Court in Phillips did "extrapolate" the *Griffin* requirements, this came only in the context of a suit brought under the last provision of § 1985(2) which—like § 1985(3)—deals with a

conspiracy to deny one the equal protection of the laws. Likewise, the *McIntosh* case dealt only with allegations under the final provision of § 1985(2). 367 F. Supp. at 505. Thus, the *Griffin* requirements—to my knowledge—have never been held to apply to suits involving the earlier provisions of § 1985(2) which are seemingly quite similar in language and intent to the provisions of § 1985(1).

As noted earlier, § 1985(1) has its roots in certain Acts of 1861 and 1871. The 1861 Act was incorporated into the 1871 Act and is now part of 18 U.S.C. § 372; each of these acts made it a crime for two or more persons to conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust ,or place of confidence under the United States. The addition of other types of private conspiracies in the 1871 Act which also involved interference with federal officers was also noted earlier. After reviewing numerous cases involving such private criminal conspiracies, I have found no authority which limits the prosecution thereof to instances where federal officers were either holding offices which required them to execute only laws related to equal protection or were discharging their duties with respect to situations involving alleged denials of the equal protection of the laws. See, for example, *U.S.* v. *Johnson,* 26 F. 682 (S.D. Ga. 1885); *Finn* v. *U.S.,* 219 F.2d 894 (9th Cir. 1955), *cert. den.* 75 S. Ct. 583 (1955); *U.S.* v. *Burgos,* 328 F.2d 109 (2nd Cir. 1964); *U.S.* v. *Hall,* 342 F.2d 849 (4th Cir. 1965); *U.S* .v. *Barber,* 442 F.2d 517 (3rd Cir. 1971); and *Murphy* v. *U.S.,* 481 F.2d 57 (8th Cir. 1973). Similarly, prosecution of private conspiracies aimed at interfering with witnesses in federal courts—recognized in the second section of the 1871 Act—have also not been so limited. See § 136 of "An Act to codify, revise, and amend the penal laws of the United States," March 4, 1909, 35 Stat. 1089, at 1113; 18 U.S.C. § 371; and 18 U.S.C. § 1503. And it may be that the civil remedy for private conspiracies aimed at the deprivation of, or the threat of the deprivation of, the right to vote in federal elections—proscribed in § 1985(3)—need not allege racial or otherwise class-based animus. See *Paynes* v. *Lee,* 377 F.2d 61, 63-4

(5th Cir. 1967) wherein the Court stated in such a civil case [although the plaintiff was black]:

> "The Fourteenth Amendment is only a protection against the encroachment upon enumerated rights by or with the sanction of the State. The interference with a Federally protected right to vote is something more and something different. Moreover it has had the specific attention of Congress which has provided a specific remedy for interference by private individuals. By the sometimes called Ku Klux Act, a federal right was created to recover damages for interfering with Federal voting rights as well as for deprivations of equal protection or equal privileges and immunities under the Fourteenth Amendment . . . Federal voting rights arise from the relationship of the individual and the Federal government . . ."

See also *Griffin* v. *Breckenridge,* 410 F.2d 817, 826 (5th Cir. 1969), *rev.'d on other gds.,* 403 U.S. 88 (1971).

V.

In further support of their motion to dismiss, defendants contend the allegations are insufficient under § 1985(1) since they do not involve charges of physical violence or threat thereof. Such charges, they argue are necessary under the statutory phrase "force, intimidation, or threat." I find the allegations of the complaint to be sufficient notwithstanding this contention.

As plaintiff notes, under the ordinary rules of statutory construction, the phrase "force, intimidation, or threat" is inapplicable to several of the provisions of § 1985(1). Assuming the allegations of the complaint to be true, a cause has been stated under at least one of these provisions. Also see Cong. Globe, 42d Cong., 1st Sess., pp. 750 and 755. Furthermore, even if applicable, the aforementioned phrase would not foreclose this cause of action since plaintiff has sufficiently alleged threats and intimidation. See, for example, *U.S. ex rel. Smith* v. *Heil,* 308 F. Supp. 1063 (E.D.

Pa. 1970) and *Azar* v. *Conley,* 456 F.2d 1382, 1389 (6th Cir. 1972). Unlike the situation in *Sarelas* v. *Anagnost,* 332 F.2d 111 (7th Cir. 1964), the complaint here goes far beyond charging the defendants with "some kind of defamation;" and unlike *Sarelas,* there is a strong federal government interest—besides the plaintiff's personal interest—in the prompt resolution of the controversy brought before this Court.

In accordance with the preceding analysis, defendants' motion to dismiss is denied.

It is so ordered and decreed.

ENTER:

/s/ James B. Parsons
JAMES B. PARSONS
Chief Judge
United States District Court

Dated: June 4, 1975.

Appendix D

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

SHERWIN S. STERN v. U.S. GYPSUM CO., INC.	No. 74 C 3300

MEMORANDUM OPINION AND ORDER

Presently pending is defendants' motion for modification of the order entered June 4, 1975 in which their motion to dismiss was denied. In support thereof, they argue that their conduct, as alleged by the plaintiff, is not actionable under 42 U.S.C. § 1985(1); alternatively, they request that the order be amended so as to include the proper language for certification to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). Plaintiff opposes any type of modification.

After carefully reviewing defendants' latest memoranda, I am still of the opinion that the conduct alleged in the complaint falls within the terms of § 1985(1). However, I am of the further opinion that the June 4th order involved a controlling question of law as contemplated within § 1292 (b). As noted in my earlier opinion, the statute involved herein apparently has never before been construed by a court; thus, the question raised by defendants' dismissal motion appears to be one of first impression, on which there is substantial ground for difference of opinion. Also see, for example, *Colon* v. *Tompkins Square Neighbors, Inc.*, 294 F. Supp. 134, 139-140 (S.D. N.Y. 1968) and *Laura Secord Candy Shops Ltd.* v. *Barton's Candy Corp.*, 368 F. Supp. 851, 854 (N.D. Ill. 1973).

Accordingly, the final two paragraphs of this Court's Memorandum Opinion and Order, dated June 4, 1975, are hereby amended so as to state the following:

"In accordance with the preceding analysis, defendants' motion to dismiss is denied. In the opinion of this Court, said denial involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal thereof may materially advance the ultimate termination of the litigation.

It is so ordered and decreed."

It is so ordered and decreed.

ENTER:

/s/ James B. Parsons
JAMES B. PARSONS
Chief Judge
United States District Court

October 2, 1975

Appendix E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 2, 1977

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

No. 76-1070

SHERWIN S. STERN
Plaintiff-Appellee,

v.

UNITED STATES GYPSUM, INC., CHARLES E. DYKES, WILLIAM R. HOGAN, and THOMAS HEFFERNAN,
Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Illinois

No. 74 C 3300

JAMES B. PARSONS, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* in the above-entitled cause by Sherwin S. Stern, plaintiff-appellee, a vote of the active members of the court was requested, and a majority of the

active members of the court have voted to deny a rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing.* Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Senior Circuit Judge John S. Hastings did not participate.

Appendix F

SUPREME COURT OF THE UNITED STATES

No. A-166

SHERWIN S. STERN,
Petitioner,

v.

UNITED STATES GYPSUM, INC.,
et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 30, 1977.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 23rd day of August, 1977.